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Supreme Court of the United States.

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THE ROGERS PARK WATER COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. FERGUS, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF ILLINOIS.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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(17,407.)

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We avail ourselves of the opportunity given by the rules of this court to note some points in reply to arguments advanced and positions assumed by counsel for defendant in error, and to cite some additional authorities, and especially some late cases which seem to us to be of weight and to add something to the positions assumed by us in this case.

The suggestion appears (p. 11, Brief of Defendant in Error) that this court must first determine whether the case presents, besides the Federal question which it is explicitly stated in the same brief does exist in this case, any other matter or issue sufficiently broad to maintain the judgment of the court below; and, if so, the judgment must be affirmed. The same brief, page 9, states the issues to have been six in number, and these were (1) size of building, (2) that the ordinance under which we claim was not passed by the village of Rogers Park; (3) that there was no assignment by Keeler to plaintiff in error of his rights under the ordinance; (4) that no contract ever existed by virtue of said ordinance; (5) that the rates tendered complied with the subsequent ordinance of 1897; (6) that plaintiff in error did not fix rates by any rule or regulation.

Of these the first, second, third, fifth, and sixth came on for trial before the court and a jury. The fourth tendered an issue of law as to whether what was done amounted to a contract, and this, of course, was not submitted to the jury. Upon the first issue no evidence was introduced by plaintiff in error, and defendant in error proved the allegation in his petition. On the second the plaintiff in error made a good *prima facie* case, but some evidence tending to contradict the case of plaintiff in error was introduced by defendant in error. The court instructed the jury to find for defendant in error. The effect of this ruling was to decide that the ordinance of the village of Rogers Park, under which the works were built, could not in any event weigh against the later ordinance of the city of Chicago, prescribing different and lower rates for water than those contained in the former ordinance. It is

thus clear that no issue of fact arose upon this point, for the court decided the whole matter as an issue of law, and this was affirmed in the supreme court of Illinois (Rec., p. 101). The third issue was fully proved by plaintiff in error, and no proof was introduced on this point by defendant in error.

The fifth issue was proved by defendant in error, and the sixth issue was proved by plaintiff in error by the introduction of the ordinance of the village of Rogers Park, which prescribed the rates which plaintiff in error demanded. Sec. 12: "The said grantee or assigns shall charge the following rates" (Rec., p. 50). Then it was that the trial court refused all the instructions requested by the plaintiff in error and instructed the jury to find for defendant in error.

This was no more than to reaffirm the rulings already made by the same court in deciding the demurrers which had come before it, and no issues appear in this case upon which the decision of the supreme court of Illinois can rest outside of the Federal questions involved: That the ordinance of the village of Rogers Park could not in any event and did not after its acceptance by plaintiff in error constitute a contract with reference to the rates for water to private consumers which might be collected by plaintiff in error during the ordinance period of 30 years, and that a subsequent ordinance fixing a different and lower schedule of such rates, passed without the consent of plaintiff in error and never accepted by it, did not, therefore, impair the obligation of a contract, nor take without due process of law the property of plaintiff in error. These rights having been specially set up and claimed by plaintiff in error below, as appears upon the record, and the decision of the supreme

court of Illinois having been adverse to such claim, this court takes jurisdiction.

No attempt has ever been made before to urge that, because plaintiff in error filed no points in writing, as provided in the practice act, chap. 110, sec. 57, Starr & Curt., R. S. Ill., therefore it could not assign error upon the denial of its motion for a new trial. The supreme court of Illinois has uniformly held that, unless objection is made, such statement will be treated as waived, and that the want of it cannot be first urged in an appellate tribunal. This record shows no such objection, and it can have no standing here, where it is mentioned for the first time (Bromley *vs.* People, 150 Ills., 297, 299.)

The argument to the effect that no special contract was shown to exist between the parties, contained in brief for defendant in error, pages 22–25, need not detain the court. Like the argument as to whether or not there was reversible error in the rulings of the trial court in the giving and refusal of instructions and upon various matters of practice in mandamus cases, argued in said brief, pages 20, 21, these questions are not before this court for determination. Their only office here would be to befog the issue, unless, as we infer alike from the statement of counsel and the identity of matter, the argument to the supreme court of Illinois, where these questions were pertinent, has been reprinted here, where they do not apply (Brief, p. 12; "The same sequence of points will be made in this argument as was made in the supreme court of Illinois.") It is hardly necessary for us to say that the issues here are much narrowed, and it does not devolve upon this court to traverse

all the ground covered by the supreme court of Illinois merely because that court was forced to do so.

The case before the court does not depend upon any claim of monopoly or exclusive right or privilege. That question does not arise in this case, and decisions like Jackson Co. Horse R'y Co. *vs.* Interstate Rapid Tr. Co., 20 Fed. Rep., 306, which are cited to show the rule as to exclusive privileges, should be closely scrutinized and not extended beyond the reason for the rule announced, which reason was that one who claimed an exclusive privilege claimed something in apparent conflict with equality of right, and the rule is stated to be that the claimant must therefore show clear warrant of title and probably corresponding benefit to the public. We do not seek to deny or evade the rule that we must show the grant under which we claim; but that fully appears in the statutes of Illinois printed in our brief, pages 15–18, and the ordinance herein of the village of Rogers Park, as set out in the answer, to which the demurrer was sustained (Rec., pp. 44–52).

The position of defendant in error, as it is stated by him (Brief, pp. 39–47), seems to be that because the transaction is purely legislative, and not at all a contract, as he asserts, therefore the rate to be charged for service rendered by the grantee must always be open to review and to change from time to time and at all times. Upon this point he is specific and has placed himself squarely and unequivocally before the court.

It is true he seeks for support in supposed constitutional limitations and supposed legislative defects; but in order to substantiate the existence of such limitations and defects he

falls back upon constructions which in turn rest on this very chain of reasoning.

The three Illinois decisions cited do not support his claim in the form in which it is urged in this case.

The case of Carlyle *vs.* Carlyle Water, etc., Co., 52 Ill. App., 577, arose before the statute of 1891, and all the court there said upon the subject was only *obiter dicta*.

In the gas case of City of East St. Louis *vs.* East St. Louis Gas, etc., Co., 98 Ill., 415, the city was under a private charter and it had exercised an implied power in making the gas contract, so far as the term was concerned, at least, but the judgment for the amount claimed by the gas company was affirmed. The separate opinion of Mr. Justice Walker, who assented to the decision of the court, is not to be considered as the opinion and decision of the court, in any possible view of the case. We contend that it was only by means of the ordinance provisions which, when accepted and acted upon as therein provided, became a contract, as we claim in the case at bar, the village of Rogers Park was enabled to procure a supply of wholesome water for the use of the village and its inhabitants; and these reasons do not apply with anything like the same force to the case of a gas company already in operation for many years and already supplying gas to the city and its inhabitants under an old charter.

In Milliken *vs.* County of Edgar, 142 Ill., 528, the court had to deal with a political division created for governmental purposes and without general municipal powers. What the court there decided was that the contract under which Milliken claimed, and which purported to employ him for three years as keeper of the county

poor-house at a stated annual salary, while the board of supervisors which employed him only held office for one year, exceeded the power of the board, and therefore afforded no basis for a suit for damages when he was discharged by a subsequent board. The court comment on the nature of his duties and follow former decisions with reference to the employment of school teachers for terms extending substantially beyond the existence of the official term of the school directors who employed them. These cases are not analogous to the one at bar.

The nature of the position assumed by defendant in error seems to be that all the courts and all the lawyers have been quite astray and have reasoned from false premises to a faulty conclusion in all the cases from *Munn vs. Illinois*, 94 U. S., 113, although some of them have been correctly decided. (Brief, pp. 39, 40). He holds that it is not possible for the legislature to have any right definitely to fix the price of a service rendered to the public for any period of time, no matter how brief. On his theory this must apply equally, whether the service be rendered directly by the municipality which owns and operates the public-service plant, be its nature what it may, or whether the municipality has adopted the expedient of granting the right to some individual, firm, or corporation to install and operate such a plant, and thus to provide the given service to the public. If the right to fix the rate exists in one class of cases, so must it in the other.

The proposition is that where the public or any individual may demand the performance of a service as a legal right, whoever receives the service cannot be compelled to pay more than what a court of competent jurisdiction will de-

cide to be a reasonable price therefor at the time the service is rendered. "No legislature nor any sovereign can deprive them of this right," which is asserted to be inherent and inalienable and a self-evident truth.

Let us see. While it is possible that all the decisions are awry, it is also possible that counsel is in error. The rates to be charged by municipalities for services rendered directly by them are in the last analysis governed largely and in some important cases entirely by the views of public policy held by the State or the community. Public schools provide a familiar and important class of public services rendered for less than cost, and sometimes even quite free of cost, to those who receive them. Public libraries are often found conducted on the same plan by municipalities. Even in the case of water supply similar principles have been adopted, and much water is now supplied by Chicago, for instance, through the city water works, built, maintained, and operated by the city, for which no charge is made to those who use the water. This is done for the reason it was deemed expedient to encourage the increased use of water as a sanitary measure. On the other hand, whether water works, gas works, street railways, etc., when owned and operated by the public, shall be made to produce a revenue to go in reduction of taxation, or whether only such rate shall be charged as will maintain and operate them with due allowance for a return on the investment, or at some other rate, are questions of policy to be determined by the proper authority representing the public. We feel sure that courts will hesitate to assume the function of deciding such questions. These have always been held to devolve on the legislative branch of government, and there they must rest, in our view, unvexed by suits by those who

have paid the properly established rate for such service, and who, in the guise of a suit to recover back an excess which they claim such rates to embody, now seek to have the court decide what policy the municipality ought to adopt. To this must we come, and at once, if the position of counsel is sound and to be adopted by this court. Equally unsound is the position assumed that where an ordinance has been accepted which prescribes rates for service the grantee may appeal to the courts to permit a different and higher rate to be charged. The danger apprehended by counsel we do not dread as being any worse in this respect than with reference to many other subjects about which contracts are freely made without any power to revise them at the request of either party. Risk is an element in business, and hence in all business contracts. While the time is generally longer in public-service contracts, the fluctuations are much less violent than those ordinarily incident to other business. Of course, water works and street railways and gas and electric light plants have been started in many places as speculative ventures which have failed; and this must go on to the end of the chapter, while human nature remains the same. Other kinds of business have failed, too, under similar conditions. Some of these investments have proved largely profitable, but not more so than many other kinds of investment in the same places, with the general prosperity of which, indeed, their own is closely knit. Shall this element of uncertainty which inheres in all business be deemed a sufficient ground for judicial interference?

When we place the right to fix rates for such period as the legislature may determine to be reasonable, and on such a a schedule as the municipality may decide, upon the ground

that this is the exercise of an authority by the municipality which is incident to its right to contract and is not in any just sense an exercise of legislative power, we place it on its true basis and avoid all the real objections which counsel has conjured up.

Counsel asserts that the legislature itself had no power, and that the municipality had no power to establish a schedule of water rates to be paid by private consumers during any specified period. In the language of the assertion (Brief, pp. 15, 39), where it is made a principal heading of the brief, and again in the argument, this statement applies equally to municipal water works and to those erected and operated by others. We have already tried to show the unsoundness of the assertion and of the reasoning of counsel with reference to municipal water and like works, and we contend the claim is equally fallacious when urged with reference to a case like the one before the court.

The case of Smyth *vs.* Ames, 169 U. S., 466, is one of subsequent legislation intended to curb a corporation with which no contract exists, but upon which a duty devolves. In fixing the limits of such legislative power, this court dealt, as we apprehend, with the facts before it and did not seek to lay down any rule which would govern totally unlike cases by its decision therein. We submit that any variation which might be found to exist in the facts provable in cases like Smyth *vs.* Ames, growing out of differing circumstances which might occur at different times, affords no light upon the questions before this court in the case at bar.

We have already cited a few cases which seem to us to

lay down the true rule herein. We contend that the legislature had the right, and that it gave the municipality the right, to fix the schedule of rates to be paid by private consumers who should take water from the company during the ordinance period of thirty years.

The statute speaks for itself, and on ordinary rules of grammatical construction, we submit, cannot be cut down after the fact, as has been attempted by the supreme court of Illinois in these water cases, and counsel adds nothing to those decisions.

We have already cited Ill. Trust & S. Bank *vs.* Arkansas City, 76 Fed. Rep., 271. In that case the court used pertinent language applicable to more than one feature of the one on hearing. With reference to the claim that the ordinance gave a grant of an exclusive character on its face, and that this was void, the court (p. 281) said in effect, as we say here, that this feature is not involved.

With reference to the right to fix the rate for hydrant rentals for 21 years, the court held squarely that the right existed, not as a legislative, but as a contractual power, exercised as a business or proprietary right to obtain a private benefit for the city and its denizens. The reasons set up by us in the answer, to which the demurrer was erroneously sustained, as we contend, and which set out the inability of the village otherwise to secure the water supply which the health and comfort of its inhabitants required, were here considered by the court, and the only way to obtain the investment of the requisite capital which we alleged, the court assumed in that case, where it was said that fixed rates for a definite and suf-

ficient length of time provide the only basis upon which such investment can be had.

Atlantic City Water Works Co. *vs.* Atlantic City, 48 N. J. L., 378, is a case decided in 1886, where it was held that a fixed hydrant rental during the time the company should comply with its obligations under a contract made to obtain a supply of water by the city, the charter of which empowered it to provide by ordinance "for a supply of water for said city," was good.

The Los Angeles City Water Company has invoked the aid of this court so recently that we need take no more of its attention than to say the questions related to fixing rates for water to be paid by private consumers at a less rate by the ordinance of 1897 than that provided by the contract of 1868.

Los Angeles *vs.* Los Angeles City Water Co., 177 U. S., 558; 88 Fed. Rep., 720, S. C.

Still another attack on the same company by the city of Los Angeles has resulted in another bill to annul an ordinance passed February 26, 1900, which purported to establish reduced rates at which the water company should supply private consumers. This case is reported in 103 Fed. Rep., 711, and at page 734 the court said:

"It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that as long as it exists at all, all parties are bound by its provisions."

In Fergus Falls Water Co. *vs.* City of Fergus Falls, 65 Fed. Rep., 586, 591, the court adverts to the fact, which exists in our case, that 10 years of the 30 years of the ordi-

nance period have elapsed, and that the city at its option can buy the works at a fair price, so that the exclusive feature has expired. In our case the price is to be fixed by three skilled, disinterested arbitrators (Rec., p. 49, sec. 8).

In Maine Water Co. *vs.* City of Waterville, 93 Me., 586, decided in 1900, the term was twenty years.

The court say, page 601:

"In many cases it is absolutely necessary for a city or town to make a water contract for a term of years in order to obtain the great benefits of a water supply," which is essential to the safety and health of its citizens. "Without a contract extending over a period of years it would, we believe, frequently be the case that no individuals or corporations could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes as well as for domestic uses."

Many other decisions might be cited which embody the principles for which we contend, and which cases seem to us to be based on sound reasoning, and to be far safer and more satisfactory than the rule for which counsel for defendant in error contends. In view, however, of the very exhaustive brief and argument filed on behalf of plaintiff in error in the Freeport case, No. 348, which has been submitted in connection with this case, we believe it is not requisite that we add anything further.

Respectfully submitted.

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